SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 463

JACK D. JOHNSON,
Petitioner,

vs.

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Kansas Supreme Court, on April 12, 1969, affirmed the decision of the District Court of Reno County, Kansas, denying petitioner relief in a habeas corpus action. *Johnson* v. *Stucker*, 203 Kan. 253, 435 P.2d 35. Prior to the habeas corpus action filed in the state district court, petitioner's parole from confinement at the Kansas State Industrial Reformatory, Hutchinson, Kansas, had been revoked following a hearing by the Kansas State Board of Probation and Parole in a letter-memorandum of July 26,

1967 (R. 41). No records of the parole revocation hearing before the State Parole Board were introduced in evidence during the state habeas corpus action. The opinion of the Kansas Supreme Court and the opinion of the Reno County District Court are set out in the appendix to the petition, pages 1a and 15a, respectively.

JURISDICTION

Petitioner attempts to assert jurisdiction of this Court under 28 U.S.C. Sec. 1257. Respondent contends this Court does not have jurisdiction for two reasons. Petitioner's case is presently moot. Petitioner attacks only the validity of his incarceration in a penal institution, not the validity of his conviction. Petitioner was released from that institution on September 9, 1969, by an administrative parole issued by the Kansas Board of Probation and Parole.

Petitioner asserts that three issues concerning federal questions are presented in the petition. Two of those alleged federal questions (*Question 1*: Is a paroled prisoner entitled to due-process hearing in an action to return him to prison?; *Question 3*: May a state parole board revoke a prisoner's parole solely because he has been accused and acquitted of a new crime?) are not properly before this Court, as they were never presented to the Kansas Supreme Court.

QUESTIONS FOR REVIEW

1. Will this Court take jurisdiction in a case brought to attack institutionalization where petitioner is no longer institutionalized?

2. Will this Court take jurisdiction where alleged federal questions have not been presented to the highest court of the state from whence the petition arose?

3. Do the Kansas statutes concerning parole hearings and parole revocation hearings which allow alleged parole violators to be represented by counsel, but which does not require the parole board to hear counsel representing the alleged violator in person at the parole revocation hearing, violate the Federal Constitution?

STATUTES INVOLVED

28 U.S.C.A. § 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

K.S.A. 62-2226:

"This act shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs, and potentialities as revealed by a case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation, under probation supervision instead of in correctional institutions, or under parole supervision when a period of institutional treatment has been deemed essential, whenever it appears desirable in the light of the needs of public safety and their own welfare."

K.S.A. 62-2233:

* * *

"The presentence report, the preparole report, and the supervision history, obtained in the discharge of official duty by any member or employee of the board, shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge, the attorney general, or others entitled under this act to receive such information, except that the board or court may in its discretion permit the inspection of the report or parts thereof by the defendant or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful."

K.S.A. 62-2245:

* * *

"Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board."

* * *

K.S.A. 62-2249:

"The board shall have power to issue subpoenas requiring the attendance of such witnesses and the production of such records, books, papers, and documents as it may deem necessary for investigation of the case of any person before it. * * *"

K.S.A. 62-2250:

"At any time during release on parole or conditional release the director may issue a warrant for the arrest of a released prisoner for violation of any of the conditions of release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. * * *

"Upon such arrest and detention, the parole or probation officer shall immediately notify the director and shall submit in writing a report showing in what manner the prisoner had violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the director shall cause the prisoner to be brought before the board for a hearing on the violation charged, under such rules and regulations as the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release, or enter such other order as it may see fit."

* * *

RULES OF COURT

U. S. Sup. Ct. Rule 23 (1) (f):

1. The petition for writ of certiorari shall contain in the order indicated—

* * *

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

* * *

Kan. Sup. Ct. Rule 6(d):

* * *

(d) *Statement of Points.* Each appellant shall serve and file with his designation of the record a concise statement of the points on which he intends to rely and which will be briefed in the appeal. The points shall be without duplication, and each point shall state a particular and ultimate issue with reference to which reversible error is claimed to have been committed, but only such detail is required as will (1) enable opposing parties to judge the sufficiency of the designated record on appeal, and (2) inform the Supreme Court of the specific issues to be considered. * * *

STATEMENT OF THE CASE

Johnson was convicted of second-degree burglary and grand larceny in September 1964 and sentenced to the Kansas State Industrial Reformatory (R. 1, 10, 12). Johnson was placed on probation by administrative order of the Kansas Board of Probation and Parole on August 16, 1966, and allowed to return to his home in Story City, Iowa (R. 1, 10, 12). Johnson was later arrested on a parole-violation warrant issued by the Kansas Board of Probation and Parole pursuant to K.S.A. 62-2250 and returned to the state of Kansas. A notice of the charges against Johnson was served upon him June 20, 1967. An oral hearing before the State Board of Probation and Parole was held on July 25, 1967 (R. 11). A letter from the board addressed to Mr. Dennis O. Smith, Attorney at Law, Hutchinson, Kansas, Johnson's retained counsel, indicated that the board had determined to revoke Johnson's parole (R. 41.) That notice of revocation specifically stated that the board "gave further consideration to the case of Jack D. Johnson, taking into account the information contained

in your letter of July 25 and attachments thereto." (R. 41).

The record does not reflect that any attempts were made to secure records, documents, or testimony of witnesses on behalf of Johnson in the state administrative parole revocation hearing. The record does not reveal any indication that any attempt was made in the state habeas corpus proceeding to subpoena unsuccessfully any records, documents or persons connected with the State Board of Probation and Parole. The transcript of testimony taken on the state habeas corpus proceeding was not made a part of the record before the Kansas Supreme Court, but was supplied independently of that record by counsel for petitioner (Petitioner's Petition for Writ of Certiorari, p. 6, note 2). The state trial court determined as a matter of state law that Johnson had not sustained his burden of proof that the action of the State Board of Probation and of Parole was arbitrary and capricious, that Johnson was not entitled to relief on his allegations of procedural irregularities in the state habeas corpus procedure, and that Johnson was not entitled to be represented by his retained counsel at the administrative parole revocation hearing on July 25, 1967 (R. 10-14), and the Kansas Supreme Court affirmed on appeal.

Johnson was represented by counsel prior to the parole revocation hearing (R. 30, 41).

ARGUMENT

I. The Petition Is Moot Because Johnson Is No Longer Institutionalized.

The validity of action of the Kansas Board of Probation and Parole revoking Johnson's parole in 1967 is questioned by the petition for certiorari. The habeas corpus

action brought in the state district court attacked only the validity of institutionalization (R. 4-5). The validity of the conviction upon which Johnson was originally institutionalized was not challenged. Consequently, should Johnson have prevailed at any step in the trial or appellate procedure of his habeas case the relief to which he was entitled was released from the Kansas State Industrial Reformatory. He still would have been validly convicted, and still serving his sentence on the prior parole.

On September 9, 1969, a second parole was granted by the Kansas Board of Probation and Parole to Johnson. He has subsequently returned to Story City, Iowa, his home. Since he is no longer incarcerated in the Kansas State Industrial Reformatory any relief which he might receive under the action presented herein would be moot. He has already received that relief in effect by his release from the state reformatory. There "is no subject-matter on which the judgment of this Court could operate. . . ." *Parker* v. *Ellis*, 362 U.S. 574, 575 (1960); *Ex parte Baez*, 177 U.S. 378, 390 (1899) The petition for certiorari should therefore be denied for mootness. *Parker, supra.*

The doctrines announced recently by this Court in *Caracas* v. *LaVallee*, 391 U.S. 234 (1968) and *Peyton* v. *Rowe*, 391 U.S. 54 (1968), are inapplicable (1) because a state habeas corpus action is the subject of the litigation, and (2) on the facts since this case concerns only institutionalization.

II. This Court Does Not Have Jurisdiction to Review Allegations of Error That Were Not Presented to the Kansas Supreme Court.

The petition alleges Johnson was deprived of a due-process hearing in the administrative parole revocation proceeding in violation of federal constitutional rights.

He alleges this in two contexts. From a broad viewpoint, he alleges that the entire proceeding deprived him of due process because his parole was revoked without allowing him a chance to respond to the charges, know of the charges, or confront the witnesses against him (Petition for Writ of Certiorari, pp. 9-11). He then makes a more specific allegation that since his retained counsel was not allowed to appear with him at the parole revocation hearing, he was deprived of due process (Petition for Writ of Certiorari, pp. 11-22). While the latter question was considered by the Kansas Supreme Court in its opinion affirming denial of habeas corpus relief, the former question was not presented to the Kansas Supreme Court. The statement of points (R. 25-26) required by state law [Kansas Supreme Court Rule 6(d)] relates to trial court rulings concerning the *habeas corpus proceeding itself* (Points 1, 2, 3, 5, 6); alleges that the trial court's ruling was contrary to the evidence that was introduced in the trial court (Points 7, 8); alleges that the trial court erred in concluding the Board of Probation and Parole had not exceeded its state statutory authority (Point 9); alleges the trial court erred in concluding that petitioner did not have an absolute right to counsel present at the parole revocation hearing (Points 4, 10); and catchall allegations that the previously stated errors would entitle petitioner to habeas relief (Points 11, 12). The opinion of the Kansas Supreme Court on petitioner's appeal clearly reveals that the only "due process" argument that was presented to that court concerned representation by counsel at the parole revocation hearing. *Johnson* v. *Stucker*, 203 Kan. 253, 255-261, 453 P.2d 35, 39-41 (1969). The remainder of the contentions determined by the Kansas Supreme Court, as indicated in that opinion, related to questions under state law (1) as to whether or not petitioner had sustained the burden of proving his allegations of arbitrary and

capricious action on the part of the Board of Probation and Parole, as (2) of procedural infirmities in the habeas corpus proceeding. *l.c.* 261.

The allegation, made for the first time before this Court, that Johnson was deprived in a broad sense of a due-process hearing before the Board of Probation and Parole was not presented to the state district court, nor was it presented to the Kansas Supreme Court on appeal. Consequently, this Court is without jurisdiction to consider the matter. *Ellis* v. *Dickson,* 349 U.S. 458, 460 (1955); *Edelman* v. *California,* 344 U.S. 357, 358-59 (1953). This is true, irrespective of the fact that the only argument which may properly be presented to this Court arises under the same constitutional protection of the Fourteenth Amendment, *i.e.*, the due-process clause. *Wilson* v. *Cook,* 327 U.S. 474, 484 (1946).

Rule 23(1)(f) of this Court specifically provides, where a review of a state court judgment is sought, that

> "the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Although we feel the references in petitioner's statement of the case do not meet the technical requirements of this rule, we have read those references and attempted to discern the manner and method by which this particu-

lar argument was presented to the trial court and the Kansas Supreme Court. The only specific reference in those proceedings to a due-process right concerns allegations of right to counsel which are presented in a separate and distinct argument (Question 2 of the petition). The petition has not met the requirements of Rule 23(1)(f). Petitioner has not reasonably presented the alleged federal question to the courts of the State of Kansas.

Petitioner's third allegation concerns an alleged violation of his Fifth and Fourteenth Amendment rights against double jeopardy. The argument presented heretofore under this heading is applicable to this allegation also. Suffice it to say that the "double jeopardy" claim does not appear in the original petition for writ of habeas corpus (R. 3-5), the statement of points (R. 25-27), or the opinion of the Kansas Supreme Court. *Johnson, supra.* This argument was not presented to the Kansas courts, and is presented for the first time in the petition for certiorari. Accordingly, this Court is without jurisdiction to hear it. *Ellis, supra; Edelman, supra.*

We note with interest counsel for petitioner apparently has filed with the Clerk of this Court the transcript of the habeas corpus proceeding had in the District Court of Reno County, Kansas. Admittedly, this transcript was not a portion of the record certified to this Court by the State Supreme Court, and was not before the State Supreme Court (Petition for Writ of Certiorari, p. 6). We assume that, because counsel for petitioner saw fit to transmit this document to the Court and refer to it in their petition, they attach some significance to it. We only invite the Court's attention to the rule that review on petition will consider only the record in this Court as certified to it by the State Supreme Court. *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958). Although we have not taken the occasion to

violate what we consider proper procedure, should the Court determine this rule inapplicable in this case, we would also be more than willing to present authenticated copies of records of the Kansas Board of Probation and Parole concerning the revocation hearing at issue herein.

III. The Kansas Administrative Parole Statutes, Which Allow Representation by Counsel in Revocation Cases but May Not Allow Counsel to Be Present at the Hearing, Are Constitutional.

One reading the petition for certiorari and comparing that document with the Kansas statutes concerning parole revocation hearings and the record is at once struck with the dissimilarity of the case presented by the petition and the actual parole revocation procedure constructed by the Kansas statutes. The petition creates the impression that Johnson was summarily extracted from Story City, Iowa, thrust before the administrative tribunal hearing the parole revocation proceeding, denied all assistance in his behalf, not given an opportunity to explain or defend against the parole violations alleged against him, and that he subsequently suffered a summary parole revocation. As a matter of both state law and fact, this is erroneous.

Under K.S.A. 62-2245 (p. 4, *supra*), the Board of Probation and Parole is granted authority to place on parole, or release from confinement, any person confined in a state institution when "in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself." Parole revocation proceedings are authorized by K.S.A. 62-2250 (p. 4, *supra*). That statute provides that during the parole, the Director of Probation and Parole may issue a warrant for the apprehension of a parolee when it is alleged he has

violated the conditions of his parole. The statute specifically provides that notice of the charges shall be served personally upon the prisoner. As a matter of fact, Johnson was served with such a notice on June 20, 1967 (R. 6). The parole revocation hearing was held July 25, 1967. There is no allegation that there was not sufficient time to become aware of the nature of the charges contained in the notice, and prepare a response. K.S.A. 62-2250 also provides for a parole revocation hearing. Such a hearing was held, and Johnson personally appeared at the hearing.

K.S.A. 62-2248 permits the Board to refuse to hear arguments presented by an attorney *in person* at the hearing itself. This statute also specifically authorizes persons "not connected with the correctional system", such as a retained attorney in this case, to present their arguments in a written form to the Board for its consideration. The record affirmatively indicates that Mr. Dennis Smith, the retained attorney of whose assistance Johnson alleges he was deprived, actually did file written documents pursuant to the authority granted by this statute with the Board (R. 41). The record also reflects that this material was considered by the Board prior to the time it revoked Johnson's parole (R. 41).

K.S.A. 62-2249 (p. 4, *supra*) authorizes the Board to issue subpoenas or compel the attendance of witnesses or the production of records in any of its proceedings. The record does not indicate that Johnson or his retained counsel at any time ever requested the production of any witness or any document.

The question presented by the petition for certiorari is whether or not a parolee "in a parole-revocation action [is] entitled to the assistance of counsel." (Petition for

Certiorari, p. 11). The abstract issue presented by this question is not relevant to the facts arising under the Kansas statutes and more significantly this case. Johnson did have the assistance of counsel. Admittedly, Johnson did not have counsel actually present with him during the time he was granted an oral hearing with the state board. Therefore, the precise question which must be presented by the petition is not the abstract one stated previously, but the more specific question whether the Kansas statutory scheme work which allows representation of counsel to the extent of submission of arguments in a written form to the Board of Probation and Parole, but which allows the Board in its discretion to refuse to personally hear the arguments of counsel, or permit the attendance of counsel at the hearing, denies petitioner the right to counsel under the Sixth and the Fourteenth Amendments. We respectfully submit that it does not.

Although we feel this case should be dismissed for want of jurisdiction, we shall proceed to present argument on the merits of the right-to-counsel issue. The abstract principle presented in the petition, when considered in light of the foregoing analysis of Kansas statutes, must be construed to allege that because Johnson did not have counsel present with him in the hearing room during his hearing before the parole board, his Sixth and Fourteenth Amendment right to counsel was violated.

We have extensively researched the question whether these federal rights require counsel *at* administrative parole revocation hearings. Contrary to the position set out in the petition for certiorari, we conclude the overwhelming weight of authority is that no such right to counsel exists at the administrative parole revocation hearing.

We are unable to find any Federal Circuit Court decision holding, on the basis of the Sixth and/or Fourteenth Amendment that counsel is required at administrative parole revocation hearings. As a matter of fact, *we find unanimous authority to the contrary.* The circuits in which we were able to discover fairly recent opinions have all held that the Sixth and Fourteenth Amendment rights to counsel, even subsequent to *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Mempa* v. *Rhay*, 389 U.S. 128 (1967), have no application to administrative parole revocation hearings. *Third Circuit—Washington* v. *Hagan*, 287 F.2d 332, 334 (3rd Cir. 1960), *cert. denied*, 366 U.S. 970 (1961); *Fourth Circuit—Jones* v. *Rivers*, 338 F.2d 862, 864, 872 (4th Cir. 1964); *Sixth Circuit—Rose* v. *Huskins*, 388 F.2d 91, 95 (6th Cir. 1968), *cert. denied*, 392 U.S. 946 (1968); *Seventh Circuit—Richardson* v. *Markley*, 339 F.2d 967, 969 (7th Cir. 1965), *cert. denied*, 382 U.S. 851 (1965); *Ninth Circuit—Dunn* v. *California Department of Corrections*, 401 F.2d 340, 342 (9th Cir. 1968); *Eason* v. *Dickson*, 390 F.2d 585 (9th Cir. 1968), *cert. denied*, 392 U.S. 914 (1968); *Williams* v. *Dunbar*, 377 F.2d 505, 506 (9th Cir. 1967), *cert. denied*, 389 U.S. 866 (1967); *Tenth Circuit—Williams* v. *Patterson*, 389 F.2d 374, 375 (10th Cir. 1968); *Gonzales* v. *Patterson*, 370 F.2d 94, 94 (10th Cir. 1966); *D.C. Circuit—Hyser* v. *Reed*, 318 F.2d 225, 237, 238, 239 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957 (1963).

Recent decisions of the federal district courts are in accord. *See, e.g., Lawson* v. *Coiner*, 291 F. Supp. 79, 82-83 (N.D. W.Va. 1968); *United States* v. *Brierly*, 288 F. Supp. 401, 401 (E.D. Pa. 1968); *Holder* v. *United States*, 285 F. Supp. 380, 381-382 (E.D. Tex. 1968); *Sammons* v. *United States*, 285 F. Supp. 100, 102 (S.D. Tex. 1968); *Sorensen* v. *Young*, 282 F. Supp. 1009, 1010 (D.C. Minn. 1968); *United States* v. *Hartsell*, 277 F. Supp. 993, 995 (E.D. Tenn. 1967).

Further, our review of the recent state court decisions indicates that an overwhelming majority of those decisions subsequent to *Mempa* also hold that there is no federal right to counsel at an administrative parole revocation hearing. *See, e.g., Johnson* v. *Wainwright*, 208 So.2d 505, 505-6 (Fla. 1968); *Wingo* v. *Lyons*, 432 S.W.2d 821, 823 (Ky. 1968); *Saunders* v. *Michigan Parole Board*, 166 N.W.2d 278, 279 (Mich. Ct. App. 1968); *Smith* v. *Warden, Nevada State Prison*, 450 P.2d 356, 357 (Nev. 1969); *Johnson* v. *State*, 160 N.W.2d 37, 44-45 (N.D. 1968); *Murray* v. *State*, 444 P.2d 236, 237 (Okla. Crim. 1968); *Beal* v. *Turner*, 454 P.2d 624, 625-6 (Utah 1969); *Folkes* v. *Turner*, 449 P.2d 649, 649 (Utah 1969); *Riggins* v. *Rhay*, 450 P.2d 806, 808, 809 (Wash. 1969).

We have examined the federal cases cited by counsel for petitioner and find them not in point. For example, in *Ashworth* v. *United States*, 391 F.2d 245 (6th Cir. 1968), the Sixth Circuit held that in a federal probation revocation hearing where *sentence had not been pronounced*, similar to *Mempa*, counsel is required. The Sixth Circuit noted that in *Ashworth* that not only had the sentence not been determined and pronounced but there existed a great deal of judicial discretion concerning the length of sentence. *l.c.* 246. The remaining federal cases cited concern statutory interpretations of various federal statutes providing the procedure upon which federal parole or probation may be revoked. The context in which those cases arises is significant because the basis of the holding in such cases is that as a matter of *statutory construction* counsel may be required. *Compare, Hyser* v. *Reed*, *supra*; at 237-239, with *Barnes* v. *Reed*, 301 F.2d 516, 517-8 (D.C. Cir. 1962); *Reed* v. *Butterworth*, 297 F.2d 776, 778 (D.C. Cir. 1961).

The state cases cited in the petition (pp. 13-14) concern factual situations analogous or similar to *Mempa*. They all concern deferred or suspended sentences. None of the cited cases involves an administrative parole.

The petition by a gross generalization characterizes the administrative parole revocation hearing in the same class with sentencing procedures, including probation with deferred sentencing. There are obvious and fundamental distinctions which have continuously been noted by the courts considering the respective proceedings. Noteworthy in that regard is this court's holding that formal due process procedural requirements do not apply to an administrative parole revocation hearing. *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935). The Sixth Amendment guarantee of right to counsel applies to "criminal proceedings." While the imposition of sentence may be a portion of a criminal proceeding in that the activity of the court vis-a-vis a criminal defendant has not yet been completed, such that right to counsel is required under the Sixth Amendment (*Townsend* v. *Burke*, 334 U.S. 736 [1948]), the same situation does not exist after sentence has been pronounced, the criminal defendant committed to a state institution, and, by virtue of authority granted by the state legislature, been conditionally released from behind the walls of the institution to serve a portion of his already-pronounced sentence in the community. Consequently, the Sixth Amendment right to counsel does not apply to an administrative revocation hearing because the latter is not part of a "criminal prosecution." *See, e.g., Hyser* v. *Reed, supra*, at 237; *People* v. *Follette*, 295 N.Y.S.2d 565, 571-72 (N.Y. Sup. Ct. 1968); *Saunders* v. *Michigan Parole Board, supra*.

> "When a court suspends the pronouncement of sentence, the judicial process has not been completed. It

remains in a state of suspense; not so in the case of a prisoner who has been sentenced in a prison." *Ex parte Anderson*, 229 P.2d 633, 640 (Ore. 1951).

Indeed, the procedure whereby the criminal defendant living in the community is returned to an institution has been aptly analogized to a transfer of an inmate of one institution to another institution. *See, People* v. *Villareal*, 68 Cal. Rptr. 610, 616 (Ct. App. Cal. 1968). Under Kansas procedure, a parolee is in the "legal custody of the institution from which he was released but shall be subject to the orders of the board, . . ." while he is on parole. K.S.A. 62-2245. Being continually in the custody of the state administrative agency charged with management of the parole system, the fact that the parolee is in the community when transferred back to the institution should not change the nature of the proceeding from that of a mere institutional transfer.

For purposes of analysis under Sixth Amendment rights or rights guaranteed by the due process clause of the Fourteenth Amendment, we urge that the administrative parole revocation hearing is quite significantly different from the suspended sentence probation or parole revocation hearing. The former is purely an administrative proceeding, and the latter is a continuation of the judicial process which commenced with arrest and will end with institutionalization. *Mempa* v. *Rhay, supra*, was simply an application of the principle previously recognized by this Court in *Townsend* v. *Burke, supra*. In *Mempa, supra, Ashworth, supra*, and other like cases, the judicial proceedings have not been terminated and the criminal defendant is still subject to being sentenced. Different considerations are present when considering the administrative parole.

A parolee has been sentenced. His position in the adversary system of justice has been terminated and in its place substituted the correctional or treatment process. *Rose, supra,* p. 94; *Williams* v. *Dunbar, supra,* p. 506.

> "The period of contentious litigation is over when a man accused of crime is tried, defended, sentenced and, if he wishes, has gone through the process of appeal. Now the problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business. So long as that judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole." (*Washington* v. *Hagan, supra,* at 334).

The Kansas administrative probation and parole statutes are taken almost verbatim from the Standard Probation and Parole Act of 1955 promulgated by the National Probation and Parole Association. Concerning the issue of representation by counsel at the parole revocation hearing, section 22 of that act is similar to K.S.A. 62-2248. The authors of the act comment on the section as follows:

> "Improper activities of paid attorneys have done much to bring parole into disrepute in many states. Some attorneys solicit business from prisoners, representing that they have influence to get paroles for a fee. The representation is, unfortunately, well founded in some states. Even attorneys who are members of the legislature present cases before some parole boards in spite of the fact that in doing so they may be exerting improper influence by reason of their power to oppose appropriations and policies of the state officers who compose the parole board.
>
> "In general, it is undesirable to have attorneys or relatives and friends of the prisoner present when the parole board is interviewing and discussing his

potentialities for parole." "Standard Probation and Parole Act," National Probation and Parole Association, 1955, p. 36.

The Manual of Correctional Standards, issued in 1966 by the American Correctional Association, notes:

> "It should be clear that the revocation hearing is informal in nature and conducted solely for the purpose of the review of information upon which the parole board will or will not revoke a parole. Formal or adversary-type hearings should not be permitted, and the files of the board should remain confidential for the benefit of the prisoner as well as the parole system. The alleged violator should be able to file in his own behalf any reasonable number of oral or written statements by himself or by others which are pertinent and which will assist the board in its determination with regard to possible revocation."

It is the parolee himself, not his representative, who is the subject of the determination whether or not he is the type of person who should be released under the Board's custody in the community. The only legitimate purpose that an attorney representing him could fulfill is to present the arguments, or evidence if necessary, which would tend to explain, deny or mitigate the charges against the parolee. Under the Kansas procedure, this can be accomplished, even though the attorney is not actually present with the parolee at the hearing. As a matter of fact, this did occur in Johnson's case.

> "While representation by counsel may be essential to a meaningful appearance in some extraordinary parole proceedings, it is not essential in the kind of routine revocation hearing with which we are here concerned. The differences between such proceedings in criminal trials are so great that procedural requirements quite appropriate to trials ought not to be

mechanically imposed in absolute terms upon parole boards. . . .

". . . A rigid imposition of a procedural requirement for all cases, which serves no useful purpose in most but which unduly burdens the entire process, would be a long step backward, not forward, in the protection of personal liberties." *Jones* v. *Rivers, supra,* at 878-79.

And, as this Court has noted previously,

"Probation workers making reports of their investigations [such as parole officers] have not been trained to prosecute but to aid offenders." *Williams* v. *New York,* 337 U.S. 241, 249 (1949).

The Kansas procedure concerning representation at parole revocation hearings conforms to the announced federal standards with regard to due process right to counsel. Assistance is permissible, only appearance at the actual hearing may be prohibited.

Having previously considered that the broad due-process allegations contained in the petition are inappropriately presented here for review since they were not presented below, we only pause to briefly comment concerning due process as it applies to administrative parole revocation hearings. Due process is a rather indefinite term that means different procedures for different types of proceedings. Consequently, while for some proceedings due process contemplates an adversary proceeding and the right to confront witnesses while being represented by counsel, it may not for others, such as seeking information to furnish the basis for imposition of sentence. *See, Williams* v. *New York, supra,* at 248-250.

Concerning sentencing this court noted "the due process clause should not be treated as a device for freezing

the evidential procedure of sentencing in the mold of trial procedure." *Williams, supra*, p. 250. And as the Fourth Circuit has noted:

> "Due process of law varies widely with circumstances. It is one thing in a prosecution for crime, is another thing in administering the parole system. The Board of Parole must obey applicable legislation, but otherwise it is only required to perform its functions fairly, under fair procedures; it may not act unreasonably, capriciously or arbitrarily. Freedom, on parole from confinement in a penal institution prior to serving all of an imposed sentence, is a matter of legislative grace—it is neither constitutionally guaranteed nor a God-given right. Parolees are neither totally free men against whom the government is proceeding for commission of a crime, nor are they prisoners being disciplined within the walls of a federal penitentiary—they stand somewhere between the two." *Jones, supra*, p. 874.

And as a lower district court we think appropriately commented:

> "A revocation hearing is not a trial requiring an adversary proceeding. The right to counsel may not be built upon the privilege of probation. The sentencing process is ended: No substantial right of the defendant is in jeopardy. The judge is within his province; he may take what he has given using sound judgment and exercising the discretionary power inherent in our judicial system." *Holder, supra*, p. 381.

The same appropriate use of the discretionary powers of the State Administrative Board of Probation and Parole apply in a case such as this.

We will not belabor the point by citing additional authority supporting the proposition that in an administrative hearing of this type due process of law does not mean the same thing that it would in a criminal adversary

proceeding. We have invited the Court's attention to a few more prominent authorities on the point. However, we wish to pursue the matter a little further by noting that the procedure, outlined several times previously, provided by the Kansas statutes concerning a parole revocation hearing present tools to the parolee facing possible revocation which allow him to contest and deny the charges against him. We think under any concept of fundamental fairness the tools inherent in the statutes, *viz.*, the right to the assistance of counsel to the extent of advice and consultation, and submission of written documents of any sort or nature to the Parole Board, the possibility of subpoenaing witnesses or documents, the notice of charges upon which the hearing is predicated, an opportunity to appear before the Parole Board in person and testify,—require the conclusion that statutory framework is fair. The only request Johnson made which was denied, other than being allowed to retain his status as a parolee, was that his retained counsel be sitting at his side during the hearing before the Board. The record does not reveal that any demand or even request was made for the production of witnesses or papers. The record does not reveal any refusal on the part of the State Board to permit Johnson's attorney to present whatever supporting documents he thought pertinent to the Board, and as a matter of fact the Board indicated that it had considered those documents. (R. 41)

In closing, we note also that there are procedures available to correct any arbitrary or capricious action of the State Parole Board. Johnson attempted to do so in this state habeas corpus case. The state trial court and the Kansas Supreme Court determined on the facts as a matter of state procedure that he had not sustained his burden of proof in overcoming the presumptions which

existed under state law. That is an adequate ground for sustaining the trial court's judgment. If Johnson wished to proceed further, he could bring an action in the Federal District Court in the nature of habeas corpus alleging the illegality of this detention under the Laws and Constitution of the United States.

CONCLUSION

While we feel that Johnson's case is now moot since he has been released from custody of the institution itself, and is again on parole in Story City, Iowa, and we further believe that several of the contentions raised in the petition are inappropriately raised as they were not presented to the Kansas Supreme Court, we've taken the time to present our views concerning the nature of the administrative parole system in Kansas, as well as what we believe to be the present interpretation of constitutional rights in the context of that procedure. Obviously, any interpretation of the constitutional rights applicable to a parole revocation hearing is premised upon the viewpoint from which one views the parole system. Regardless of the method by which one's analysis of parole system is considered, one glaring fact remains. No one has a right to a parole. The only authority for a parole is that granted by statute, federal or state. Granting of a parole after one has been institutionalized is the equivalent of transferring a criminal defendant from behind the walls to in front of the walls. The parolee is not free, he is still in the custody of the state penal system. He is no longer in the same position, vis-a-vis those protections designed to protect individuals from oppressive governmental authority prior to the time that they are convicted of a crime. He is in a different position vis-a-vis those protections than he was when the criminal proceeding against

him started. To assume that the privilege of serving his sentence in the community, and it must be remembered that his sentence is still being served while he is on parole, again attaches those rights available to the criminal defendant when the criminal procedure against him began, is to overlook the obvious distinction between the two. The petition for certiorari should be denied.

Respectfully submitted,

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